



The State of New Hampshire  
*Department of Environmental Services*

Michael P. Nolin  
Commissioner



March 15, 2006

The Honorable Sheila Roberge, Chairman  
Senate Public and Municipal Affairs Committee  
State House, Room 100  
Concord, New Hampshire 03301

Re: HB 121, relative to local land use approval for facilities requiring certain pollution control permits

Dear Chairman Roberge and Members of the Committee:

Thank you for the opportunity to comment on HB 121-FN, relative to local land use approval for facilities requiring certain pollution control permits. The Department of Environmental Services ("DES") expressed concerns about this bill when it was originally introduced. While some of those concerns appear to have been addressed, DES continues to have concerns about the amended bill and does not support it.

There is little overlap between state environmental permitting requirements and local land use (zoning) requirements. DES permitting programs are intended to ensure that activities are conducted so as to minimize or eliminate adverse impacts to the environment and public health. While some permitting programs do establish set-backs,<sup>1</sup> for the most part, DES requirements do not regulate the location of regulated activity or the type of building construction that must be used to house a particular activity. Such regulation is best addressed at the local level through appropriate zoning ordinances and building codes.

In the absence of any express provisions in the statutes relative to the siting of a facility that is subject to DES regulation, DES has consistently taken the position that local regulation of such siting is allowed under current law. The New Hampshire Supreme Court has also consistently held that local governments can regulate local land use issues as long as they do not conflict with state law. See, e.g., Bio Energy LLC v. Town of Hopkinton (Slip Opinion, December 30, 2005).

<sup>1</sup> See, e.g., set-backs to hydric soils in Env-Ws 1000 relative to septic systems, set-backs to property lines in Env-Ws 1600 relative to septage management, or set-backs to protected rivers under RSA 483, the Rivers Management and Protection Program.


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HB 121 as amended would add a statement to four environmental statutes (air pollution, underground storage facilities, wetlands and groundwater protection) that the issuance of a permit by DES does not affect the obligation to obtain all lawful local approvals. This is a restatement of the established state of the law, and it is unnecessary. HB 121 does nothing to further clarify, and may indeed complicate, the relationship between state environmental regulation and local land use authority. If new law is enacted on this issue, it is likely to become fodder for further litigation.

Based on these concerns, DES does not support the bill.

Thank you for your consideration of these comments. If you have any questions, please contact Assistant Commissioner Michael Walls or me at 271-8806.

Sincerely,

  
Michael P. Nolin  
Commissioner

cc: Representative David Currier  
Representative Frederick King  
Representative Sandra Keans  
Senator Bob Odell